

1988

# Fay A. Hancock v. Planned Home Development : Brief of Appellee

Utah Supreme Court

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J. Paul Stockoale; attorney for appellant.

LaVar E. Stark; attorney for respondent.

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## Recommended Citation

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DOCKET NO:

BRIEF

880129

IN THE SUPREME COURT OF THE STATE OF UTAH

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FAY A. HANCOCK,

:

Plaintiff/Appellant,

:

Case No. 88795

vs.

:

PLANNED HOME DEVELOPMENT,

:

Supreme Court # 880129

Defendant/Respondent  
and Cross Appellant.

:

-----  
BRIEF OF RESPONDENT AND CROSS APPELLANT  
-----

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LaVar E. Stark  
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IN THE SUPREME COURT OF THE STATE OF UTAH

-----oOo-----

FAY A. HANCOCK,	:	
Plaintiff/Appellant,	:	
vs.	:	Case No. 88795
PLANNED HOME DEVELOPMENT,	:	Supreme Court # 880129
Defendant/Respondent and Cross Appellant.	:	

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BRIEF OF RESPONDENT AND CROSS APPELLANT

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JURISDICTION OF THE CASE AND  
NATURE OF PROCEEDING BELOW

The Court has jurisdiction under Article VIII, Sections 4 and 9, Constitution of Utah and 78-2-2(3)(j), Utah Code Annotated, 1953, as amended.

Abutting owners disputed the ownership of land lying East of a fence line. After a non-jury trial before Judge David E. Roth, Order, Judgment and Decree was entered in favor of Defendant and against Plaintiff, holding, inter alia, that Defendant was the owner.

STATEMENT OF ISSUES  
PRESENTED FOR REVIEW

1. Whether the Order, Judgment and Decree holding that Defendant was the owner of the land should be affirmed.

2. Whether trial Court erred in holding that Defendant had not established boundary by acquiescence.

3. Whether trial Court should be affirmed in denying "Plaintiff's Motion on Reconsideration of the Memorandum Decision".

UTAH RULES OF CIVIL PROCEDURE

Rule 59    New trials; amendments of judgment.

(b)    "Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

Rule 60     Relief from judgment or order.

(b)     "Mistakes, inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by



an independent action."

#### THE STATEMENT OF THE CASE

The non-jury trial was held before Judge David E. Roth between abutting owners concerning the ownership of land lying East of an old fence line. Plaintiff's deed contained this language: "Subject to fence line encroachment along East line". At the conclusion of the trial, Judge Roth announced from the bench his findings of fact and requested counsel to submit Memorandum of Authorities.

After consideration of the Memoranda, the Judge handed down his Memorandum Decision holding, inter alia, that Plaintiff received the property with the fence line being the East boundary; that as between Plaintiff and Defendant, Plaintiff is not entitled to claim an interest in the disputed property. The Judge also held that Defendant had not established boundary by acquiescence (R 198-200).

Formal Findings and Conclusions and Order, Judgment and Decree were prepared by Defendant's counsel and submitted to the Judge with a copy to Plaintiff's counsel (R 229).

About a week after the Memorandum Decision and before the signing of the formal Findings and Conclusions and Order, Judgment and Decree, Plaintiff filed a "Motion for Reconsideration of the Memorandum Decision" claiming that

after the decision, Plaintiff's counsel obtained a Quit Claim Deed from Plaintiff's predecessor in interest conveying to her the land in controversy (R 214-217, App 1). Defendant objected in writing to the Motion for Reconsideration (R 220-224, App 2). After verbal arguments, the Motion was denied (R 238-239) and the Judge signed and filed the formal Findings and Conclusions and Order, Judgment and Decree which had been previously submitted (R 230-237, App 3, 4).

Plaintiff filed her Notice of Appeal appealing from the Order, Judgment and Decree of March 8, 1988 and from the Order Denying Plaintiff's Motion for Reconsideration (R 241, 241).

Defendant filed its Notice of Cross Appeal from some of the Findings dated March 8, 1988, including:

- (a) That the boundaries in the various deeds are not ambiguous;
- (b) That Defendant has no claim to the property by "boundary by acquiescence".

Defendant does not appeal from the other Findings nor from the Order, Judgment and Decree dated March 8, 1988 (R 247, 248).

In 1937, Plaintiff's predecessor in title, The State Industrial School of the State of Utah received title

to land (Exhibit 1, App 5) on which it operated a farm and raised dairy and beef cattle continuously until it sold part of it to Defendant's predecessor in title, Ogden Door Company in 1979 (R 319, 320, 321, 325, 326, Exhibit 5, App 6). The West metes and bounds boundary in the 1937 deed to the State was some 31.60 feet East of a fence line. Nonetheless, during said period of time, the State Industrial School occupied the land to the fence on the West with its farming and cattle operation. The fence consisted of cedar posts and barbed wire (R 320) and was regarded as a boundary between the abutting owners (R 326). The fence was in place and upright in 1973 and 1977 when Plaintiff received title to her land by deeds, both of which were "subject to fence line encroachment along East line" (Exhibits 3 and 4, App 7, 8).

Defendant's predecessor in title, Ogden Door Company, received title from the State in 1979 (Exhibit 5, App 6), the West metes and bounds of which were along the fence line. Ogden Door Company sold part of the property to Defendant in 1980 (Exhibit 6, App 9) with the West boundary coinciding with the fence line (Exhibit 14, App 10).

Since its purchase Defendant has developed its land into an apartment house complex (R 332) while Plaintiff's land has remained vacant and undeveloped (R 330). Remnants

of the fence consisting of cedar posts and barbed wire lying on the ground along its original line were in place when Defendant purchased its property and were there in 1986 (R 329, Exhibit 16, App 11).

The professional land surveyor called as a witness by Defendant, Gary Newman, testified that Exhibit 14, the Survey Plat, shows the deed description of Defendant's property. He further testified that if called upon to survey the Plaintiff's parcel, he would:

"...survey the Westerly boundary as the deed calls for. The Easterly boundary I would stake up to a point where, if there was a fence existing, I would stake it to the fence and indicate the fact that anything East of that was a conflict and somewhat ambiguous." (R 336-338)

There was testimony of an earlier ambiguity in Plaintiff's chain of title by the witness, Russell Maughan (R 346).

#### SUMMARY OF ARGUMENTS

##### I

#### PLAINTIFF'S TITLE RUNS ONLY TO THE FENCE

The exception in Plaintiff's deeds "Subject to fence line encroachment along East line" limited Plaintiff's title to the fence line and recognized the occupation rights of the owner to the East thereof.

## II

DEFENDANT ESTABLISHED BOUNDARY TO THE FENCE  
BY ACQUIESCENCE

In the event it is held that the language of exception in Plaintiff's deed is not clear, then it is submitted that Plaintiff's Deed is ambiguous. Therefore, the abutting owners, by occupying to the fence as a boundary, effectively established it as a boundary by acquiescence.

## III

DENIAL OF PLAINTIFF'S MOTION FOR RECONSIDERATION  
OF THE MEMORANDUM DECISION WAS NOT AN ABUSE  
OF DISCRETION

Ordinarily, litigation is resolved on the basis of the facts and the law at the time of trial. Plaintiff has not established reasons sufficient to justify modification of the Order, Judgment and Decree.

## ARGUMENT I

## PLAINTIFF'S TITLE RUNS ONLY TO THE FENCE

The language "subject to fence line encroachment along East line" contained in Plaintiff's deeds constitutes an exception to the metes and bounds description. Plaintiff did not receive title to the land East of the fence.

26 C.J.J. Section 140 (3) Deeds discusses

"Exceptions" and states at page 1013:

"An exception may recognize, confirm and preserve subsisting rights and interests of third persons in the premises, covered by the general description of the grant and when such a purpose plainly appears clauses so providing will be effectuated and carried out regardless of whether the language used is technically that of a reservation or exception."

Citing Kronoff v. City of Worcester 125 NE 394

(Mass 1919)

In Kronoff there was a deed from Hubbard to Howard which contained the following language:

"However reserving to Alfred Morse, his heirs and assigns the right to the land where his dam stands and the right to flow a part of the described land with water perpetually by means of said dam, the right to dig stone and gravel about said dam for its repairs and maintenance. Hereby reserving all lands or rights to said Morse, his heirs and assigns which he or they may legally possess."

The Court said:

"Although there is nothing in the record before us of any instrument in writing from Joseph Hubbard or from any of the petitioner's predecessors in title conveying to Putnam or other mill owners the right to erect a dam and flow the land, yet the deed from Hubbard to Howard, given in 1868, refers to and recognizes such rights as existed in Alfred Morse, who at that time was a mill owner on the stream below the dam. It is properly conceded by the respondent and assumed by the referees that the language

in this deed did not create in Morse any title to the dam or rights to flow, as he was a stranger in the deed..."

"It is plain that the clause in the deed from Hubbard to Howard was not a reservation by the grantor of something in himself not in existence before, out of the granted premises, but that the purpose of the parties was to recognize and except from the grant the rights of Morse therein described; it therefor operated as an exception, although to be valid as such it must appear that the rights of the mill owners to maintain the dam were actually in existence at the date of the deed."

To the same effect is Willard v. First Church of Christ, Scientist, Pacifica, 498 P2d 987, (California 1972) wherein the Court held that a grantor may in deeding real property to one person, effectively reserve an interest in the property to another.

The Court stated:

"The determination whether the old common law rule should be applied to grants made prior to our decision involves a balancing of equitable and policy considerations. We must balance the injustice which would result from refusing to give effect to the grantor's intent against the injustice, if any, which might result by failing to give effect to reliance on the old rule and the policy against disturbing settled titles. The record before us does not disclose any reliance upon the old common law rule, and there is no problem of an ancient title. Although in other cases

the balancing of the competing interests may warrant application of the common law rule to presently existing deeds, in the instant case the balance falls in favor of the grantor's intent, and the old common law rule may not be applied to defeat her intent."

In McCarter v. Crawford, 156 NE 90, (New York 1927)

where the contract of sale was made "subject to such a state of facts as an accurate survey would show", the Court of Appeals said:

"To take subject to means to be subordinated to these facts. If a survey showed that one of the buildings encroached upon adjoining property, the Plaintiff agreed to take subject to, or under this state of facts. Unless we give this meaning to the provision, it might just as well have been left out of the contract. Of course, the encroachment might be of such a substantial nature that the plaintiff would not get the building or the main part of it, which she contracted to purchase. We can always think of extreme cases to which such a phrase would not in justice apply. The parties, however, must have intended something to be shown by a survey, some fact which might affect the property described. This fact did appear. There was a slight encroachment of the carriage house; the plaintiff contracted to take subject to this encroachment. She by her contract assumed these chances."

It appears that the abutting owners occupied to the fence as a boundary for a long period of time, in excess of



39 years. Plaintiff's predecessor, (Beth E. Carr (Peterson)) received title by a quit claim deed and not by warranty deed. Peterson conveyed to Plaintiff, in 1973, with the exception "subject to fence line encroachment along East line" thus recognizing the occupation rights of the State. Plaintiff and her son conveyed to her the property with the same exception in 1977. The State of Utah conveyed the property to Defendant's predecessor for a valuable consideration. The Plaintiff has not occupied East of the fence line and that the disputed property is part of Defendant's apartment house complex.

It is submitted that the intent of Plaintiff's grantor was clear, that is to say, she did not intent to convey East of the fence but did intend to recognize the occupation rights of the State. It is clear that Defendant relied on its deed of conveyance to the fence line. It would be unjust in the circumstances to not follow Plaintiff's grantor's intent and the reliance of Defendant on its deed.

The authority submitted by Plaintiff (Neeley v. Kelsch, 600 P2d 979 (Utah 1979)) is not dispositive in that it resolves the conflict in descriptions of two deeds from a common grantor.

DEFENDANT ESTABLISHED BOUNDARY TO THE FENCE  
BY ACQUIESCENCE

In the event it is held that the language in Plaintiff's deeds, "Subject to fence line encroachment along East line" is not clear and does not except the land East of the fence from the grant and does not recognize the occupation and ownership rights of Defendant's predecessor and Defendant, then it is submitted that such language renders the deed description ambiguous. If this is the case, the doctrine of "boundary by acquiescence" has application. See the case of Halladay v. Cluff, 685 P2d 500 (Utah, 1984).

At the time of the deed to Plaintiff in 1973, the fence had been in existence for more than 30 years. The State occupied to it as part of its farming and cattle operation. The State and the abutting owners to the East occupied to the fence as a boundary for more than 30 years. The fence was up and in place when the State made its sale to Ogden Door. Plaintiff never occupied to the East of the fence line.

If the fence line was not the East line of Plaintiff's property, then there was objective uncertainty as to the location of the East line. The abutting owners occupied to the fence and acquiesced in the fence line being the boundary.

At the trial Defendant sought to establish, through the testimony of the witness Russell Maughan, that there was objective ambiguity in deed descriptions in Plaintiff's chain of title in 1951 and 1963, from C. W. Erskine and wife to John Erskine and their son and from John Erskine and his wife to Ella Erskine. The witness testified that there was a 20 foot difference East and West between the two deeds (R 346, Exhibit 13).

Plaintiff's witness, Larry Buttars, sought to rebut this testimony (R 358-365).

Judge Roth refused to allow Defendant's counsel to recall the witness Russell Maughan to explain the difference in the testimony of these witnesses.

Nonetheless, there is no dispute that since 1973 when she received title (subject to the fence line encroachment) Plaintiff never occupied beyond the fence line; that the State continued to occupy to the fence line in its farming and cattle operation until it sold to Ogden Door in 1979 and that Ogden Door and Defendant, since 1980, claim the property East of the fence by deeds of conveyance.

If it is held that the objective uncertainty in the deed description first occurred in 1973, under the circumstances of this case it is submitted that the years

since then are of sufficient duration to establish boundary by acquiescence, even though less than 20.

III

DENIAL OF PLAINTIFF'S MOTION FOR RECONSIDERATION  
OF THE MEMORANDUM DECISION WAS NOT AN ABUSE  
OF DISCRETION

The Rules of Civil Procedure do not provide for a motion for the trial court to reconsider or review its ruling. Drury v. Luncelford, 415 P2d 662 (Utah 1966).

Plaintiff's motion asks "for relief from the order and judgment about to be entered" under Rule 60(b) (R 214, App 1) but fails to state with particularity the specific relief requested.

Counsel's Affidavit accompanying the Motion states:

"5. That said Quit Claim Deed has been recorded and based upon the Court's previous decision, Defendant's interest should now be removed and title quieted in the Plaintiff herein." (R 217, App 1)

Plaintiff did not request that the case be reopened for further evidence or for a new trial.

Defendant objected to this requested relief on the basis:

1. There is no such thing as a motion to reconsider.

2. There are factual and legal matters to be

reserved with respect to the deed including but not limited to identity, consideration and statute of limitations.

Defendant asserted that the reservation (exception) in the 1973 deed to Plaintiff (subject to the fence line encroachment along the East line) could may well have been a recognition of the rights and interests of the State to the land to the East (R 220-224, App 2).

As a general statement it is noted ordinarily that facts and the law in a given lawsuit are to be applied as of the date of the filing of the original Complaint (Archer v. Utah State Land Board 392 P2d 662 (Utah, 1964)).

Plaintiff is not entitled to relief based on facts occurring subsequent to the trial; newly discovered evidence must relate to facts which were in existence as the time of trial. In re Disconnection of Certain Territory, 668 P2d 544 (Utah, 1983)

Plaintiff, having not made a motion for a new trial under Rule 59, it was not necessary for Defendant to file opposing Affidavits.

#### CONCLUSION

The exception in Plaintiff's deed "Subject to the fence line encroachment along East line" excluded the land East thereof from Plaintiff's grant and recognized the

occupation rights to the fence of Defendant's predecessor in title. The Order, Judgment and Decree that Defendant is the owner of the land and premises described as follows ought to be affirmed, to-wit:

A part of the Northwest Quarter of Section 16, Township 6 North, Range 1 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at a point 1276.21 feet South 0 degrees 38'07" West along the Quarter Section line from the Northeast corner of said Quarter Section; running thence West 31.60 feet to an existing fence as located by survey in 1978; thence North 0 degrees 38'07" East 131.00 feet along said fence; thence East 31.60 feet to the Quarter Section line; thence South 0 degrees 38'07" West 131.00 feet along said line to the point of beginning.

On the other hand, if it is held that the exception language does not exclude the land East of the fence from the grant and recognize the occupation rights of the owners to the East, then there is objective ambiguity in the deed and Defendant has established the fence line as a boundary by acquiescence. In this event, it should be held that Defendant is the owner of the land and premises referred to above.

The Order denying Plaintiff's Motion for Reconsideration of the Memorandum Decision was not an abuse

of discretion and ought to be affirmed.

Respectfully submitted this 25th day of August,  
1988.



LaVar E. Stark  
Attorney for Defendant/  
Respondent/Cross Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on the 25<sup>th</sup> day of August,  
1988, I delivered ten (10) copies of the foregoing BRIEF OF  
RESPONDENT to the Clerk of the Utah Supreme Court, State  
Capitol Building, Salt Lake City, Utah and four (4) copies to  
J. Paul Stockdale, Attorney for Plaintiff/Appellant, at his  
office located at 2605 Washington Boulevard, Suite 340,  
Ogden, Utah.



LaVar E. Stark

(1) 261

J. Paul Stockdale  
Attorney at Law, No. 3148  
2605 Washington Blvd., Suite 340  
Ogden, Utah 84401  
Telephone: (801) 621-1384

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FIDELITY

IN THE SECOND JUDICIAL DISTRICT COURT  
OF WEBER COUNTY, STATE OF UTAH

FAYE A. HANCOCK, and  
DANIEL G. HANCOCK,  
  
Plaintiffs,

vs.

PLANNED DEVELOPMENT  
CORPORATION,  
  
Defendant.

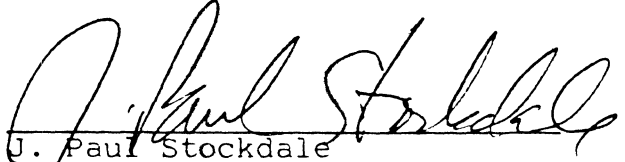
MOTION FOR RECONSIDERATION  
OF MEMORANDUM DECISION

CIV. NO. 88795

ATTORNEY AT LAW  
2605 WASHINGTON BOULEVARD  
SUITE 340 BANK OF UTAH PLAZA  
OGDEN UTAH 84401  
TELEPHONE (801) 621-1384

Comes now the above named plaintiff, by and through her attorney of record, J. Paul Stockdale, and moves this court pursuant to Utah Rules of Civil Procedure 59(b) and 60(b) for relief from the order and judgment about to be entered in the above entitled case. The facts surrounding this request are more particularly outlined in the plaintiff's attorney's affidavit and the plaintiff will rely upon the previously submitted court memorandums in this case.

DATED this 27th day of February, 1988.

  
J. Paul Stockdale  
Attorney for Plaintiff



J. Paul Stockdale  
Attorney at Law, No. 3148  
2605 Washington Blvd., Suite 340  
Ogden, Utah 84401  
Telephone: (801) 621-1384

FEB 11 9 50 AM '88

WEBER COUNTY CLERK  
FILED

IN THE SECOND JUDICIAL DISTRICT COURT  
OF WEBER COUNTY, STATE OF UTAH

FAYE A. HANCOCK, and  
DANIEL G. HANCOCK,

Plaintiffs,

vs.

PLANNED DEVELOPMENT  
CORPORATION,

Defendant.

AFFIDAVIT OF J. PAUL  
STOCKDALE

CIV. NO. 88795

Comes now J. Paul Stockdale and swears and deposes to  
the best of his knowledge and belief as follows:

1. That affiant is the attorney in the above entitled  
case.

2. That affiant, upon receiving the court's decision,  
instructed his clients to find Beth Carr Peterson, the person  
the court felt was legally claiming some interest in the  
property.

3. That affiant's client did after considerable effort  
find said Beth Carr Peterson.

4. That Beth Carr Peterson, now Beth Carr Hunter, did  
execute the attached Quit Claim Deed to the plaintiff herein  
and did remove the phrase "subject to a fenceline encroach-  
ment along the east line."

SUTH 600 BANK OF UTAH PLAZA  
OGDEN, UTAH 84401  
TELEPHONE (801) 621-1384

CERTIFICATE OF MAILING

I hereby certify that on the 8 day of Feb,  
1988, I mailed a true and correct copy of the foregoing,  
postage prepaid, to:

LaVar Stark  
2485 Grant Ave., 200  
Ogden, Utah 84401

Karen L. Evans  
Karen L. Evans/Secretary

ATTORNEY AT LAW  
2605 WASHINGTON BOULEVARD  
SUITE 340, BANK OF UTAH PLAZA  
OGDEN, UTAH 84401  
TELEPHONE (801) 621-1384

5. That said Quit Claim has been recorded and based upon the court's previous decision, defendant's interest should now be removed and title quieted in the plaintiff herein.

DATED this 8<sup>th</sup> day of February, 1988.

J. Paul Stockdale  
J. Paul Stockdale

SUBSCRIBED AND SWORN to before me this 8 day of February, 1988.

Karen L. Evans

NOTARY PUBLIC

Residing at: Ogden, Utah

My Commission expires: 2-19-90

CERTIFICATE OF MAILING

I hereby certify that on the 8 day of February, 1988, I mailed a true and correct copy of the foregoing, postage prepaid, to:

LaVar Stark  
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Ogden, Utah 84401

Karen L. Evans  
Karen L. Evans/Secretary

(2)

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C. E. STARK

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

-----oOo-----

FAYE HANCOCK,	:	
	:	
Plaintiff,	:	OBJECTION TO PLAINTIFF'S
	:	MOTION TO RECONSIDER
vs.	:	
	:	
PLANNED HOME DEVELOPMENT,	:	
	:	
Defendant.	:	Civil No. 88795

---

COMES NOW Defendant, by and through its counsel of record, LaVar E. Stark, and objects to Plaintiff's Motion to Reconsider. This objection is based on the record and file in these proceedings and on the following:

The Court based its Memorandum Decision on the evidence introduced at the trial on December 9, 1987 and the application of the law as submitted by counsel in memoranda of authorities.

After the rendering of its Memorandum Decision on February 2, 1988, Plaintiff claims to have obtained a Quit Claim Deed dated February 8, 1988 from one Beth E. Hunter, formerly Beth Carr Peterson, formerly Beth E. Carr,

purportedly conveying to her the land in question. Plaintiff claims that because of this deed title should be vested in her and she asks for reconsideration of the Court's decision.

Defendant objects.

First, there is no such thing as a Motion to Reconsider.

Secondly, there are factual and legal matters to be resolved regarding the claim of Plaintiff under the recent deed from Peterson, including but not limited to, identity, consideration and statute of limitations.

It appears that any claim of Plaintiff through Peterson, based on Peterson's reservation of ownership, is barred by the Statute of Limitations, Section 78-12-5, Utah Code Annotated, 1953, as amended, as follows:

"Seizure or possession within seven years necessary. No action for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, grantor or predecessor was seized or possessed of the property in question within seven years before the commencement of the action".

In this connection, Beth E. Carr (Peterson) received title to the property by Quit Claim Deed recorded January 9, 1967 (Exhibit A). At this time the fence along the East line was in existence and occupied to by abutting

owners as a boundary. During the time Peterson had title the State of Utah used the land East of the fence for agricultural purposes, growing crops and grazing cattle.

Defendant's predecessor, Ogden Door, received title to the fence by Quit Claim Deed recorded December 5, 1979 (Exhibit B).

Hence, Peterson either knew of the fence encroachment on her described title when she received the deed in 1967 or was charged with knowledge of the Ogden Door deed in 1979 by virtue of Section 57-3-2, Utah Code Annotated, 1953, as amended, which provides:

"Record imparts notice -- Recordation not affected by change in interest rate.

(1) Every conveyance, or instrument in writing affecting real estate, executed, acknowledged, or proved, and certified, in the manner prescribed by this title, and every patent to lands within this state duly executed and verified according to law, and every judgment, order, or decree of any court of record in this state, or a copy of it, required by law to be recorded in the office of the county recorder, and every financing statement which complies with Subsection 70A-9-402 shall, from the time of filing the same with the recorder for record, impart notice to all persons of their contents. Subsequent purchasers, mortgagees, and lien holders are deemed to purchase and take with notice.

(2) The recording of an instrument as provided in Subsection (1) is not affected by any change in an interest rate in accordance with terms of an

agreement pertaining to the obligation for which the instrument recorded was given as security".

In any event, more than seven years has expired during which time she was not seized in possession of the land in question.

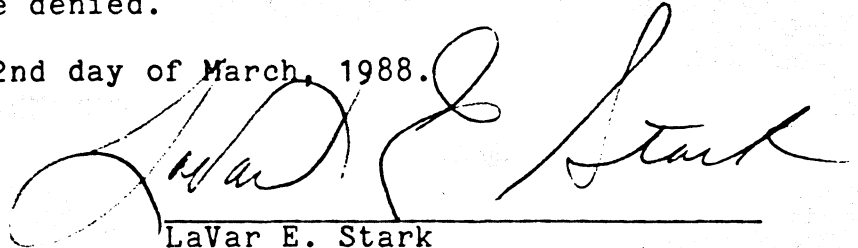
It is further noted that the reservation in the 1973 deed to Plaintiff (subject to fence line encroachment along East line) could may well have been a recognition of the rights and interests of the State to the land to the East.

Kronoff v. City of Worcester, 125 NE 394 stands for the rule that an exception may recognize, confirm and preserve subsisting rights and interests in the premises by the general description of the grant. See also Pardue v. Citizens, 247 S2d 368 (both discussed in more detail in Defendant's Memorandum of January 4, 1988).

Beth Carr Peterson is not a party to the instant proceedings; the deed of February 8, 1988 was not in existence at the time of trial nor at the time the Court issued its decision and there are questions of law and of fact with regard thereto. The presentation of evidence phase of this case has closed. Therefore, the import of the purported deed should not be determined in these proceedings.

It is respectfully submitted that the Motion to Reconsider ought to be denied.

DATED this 2nd day of March, 1988.

A handwritten signature in cursive script, reading "LaVar E. Stark", written over a horizontal line.

LaVar E. Stark  
Attorney for Defendant



572 ( )  
LaVar E. Stark #A3080  
Attorney for Defendant  
2485 Grant Avenue  
Suite 200  
Ogden, Utah 84401  
Telephone: (801) 621-3646

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

-----oOo-----

FAYE HANCOCK,	:	
Plaintiff,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
vs.	:	
PLANNED HOME DEVELOPMENT,	:	
Defendant.	:	Civil No. 88795

\_\_\_\_\_

11/2

This matter came on regularly for trial on Wednesday, the 9th day of December, 1987 before the Honorable David E. Roth, Judge, presiding without a jury at the Municipal Building, Ogden, Weber County, State of Utah, and Plaintiff was represented by her counsel of record, J. Paul Stockdale and Defendant was represented by its counsel of record, LaVar E. Stark and the Court, having reviewed the file, received the stipulation of the parties, heard the witnesses, examined the documentary evidence and having heard the arguments of counsel and having taken the matter under advisement and reviewed the memoranda of authority submitted

by the parties and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. Plaintiff and her son were named as Grantees in a Warranty Deed from Beth Carr Peterson dated June 11, 1973, recorded June 18, 1973 in Book 1027 at Page 595, conveying property described as follows:

A part of the Northwest Quarter of Section 16, Township 6 North, Range 1 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at a point 1276.21 feet South from the Northeast corner thereof, and running thence West 200.55 feet; thence North 131 feet; thence East 200.55 feet; thence South 0 degrees 38'07" West 131 feet to beginning.

Subject to fence line encroachment along east line.

2. Thereafter, Plaintiff was named as Grantee to the same property in a duly recorded Quit Claim Deed from herself and her son and his wife.

3. Defendant was named as Grantee in a Warranty Deed from Ogden Door Company, dated November 13, 1980, recorded May 20, 1981 in Book 1382, Page 390, conveying property described as follows, to-wit:

A part of the North half of Section 16,

Township 6 North, Range 1 West, Salt Lake Base & Meridian, U.S. Survey: Beginning at a point which is 694.37 feet South 0 degrees 38'07" West 31.60 feet North 89 degrees 09'45" West 355.00 feet South 0 degrees 38'07" West and 35.88 feet North 72 degrees 00'19" East from the Northwest corner of the Northeast quarter of said Section 16; running thence North 72 degrees 00'19" East 108.53 feet to the West line of Monroe Boulevard; thence South 17 degrees 59'41" East 427.81 feet along said West line to the North line of 2nd Street; thence North 89 degrees 09'45" West 273.51 feet along said North line; thence North 0 degrees 38'07" East 258.70 feet; thence South 89 degrees 09'45" East 34.00 feet; thence North 0 degrees 38'07" East 111.18 feet to the point of beginning.

4. In 1973, at the time of the conveyance to Plaintiff (and her son), a fence existed about 34 feet West of the East line of the deeds of conveyance, remnants of which were in existence to at least 1986 and which for the past 30 years has been treated by the contiguous land owners as the boundary between their properties.

5. The West line of Defendant's deed coincides with the fence line.

6. Each of the parties claim ownership in the land from Plaintiff's described East boundary to the fence line.

7. The boundaries described in the various deeds

are not ambiguous.

8. The Plaintiff was not aware of the fence nor of the reference to the fence in her deeds.

9. Plaintiff has paid the real property taxes on the land between the fence line and the East line of the metes and bounds description of her deeds from 1973 through 1987. However, during this time she did not improve or occupy the same.

10. Plaintiff has no claim to the property by "adverse possession" and Defendant has no claim to the property by "boundary by acquiescence".

11. Plaintiff claims ownership in the property by deed from Beth Carr Peterson which clearly includes the language "subject to fence line encroachment along the East line". This fence line was readily ascertainable at the time of the transfer. The clear interpretation of the language in the deed is that Plaintiff received the described property with the fence line being the East boundary. As between Plaintiff and Defendant, Plaintiff is not entitled to claim an interest in the disputed piece of property.

12. The disputed piece of property, situate in Weber County, State of Utah, is described as follows to-wit:

A part of the Northwest Quarter of  
Section 16, Township 6 North, Range 1

West, Salt Lake Base and Meridian, U.S. Survey: Beginning at a point 1276.21 feet South 0 degrees 38'07" West along the Quarter Section line from the Northeast Corner of said Quarter Section; running thence West 31.60 feet to an existing fence as located by survey in 1978; thence North 0 degrees 38'07" East 131.00 feet along said fence; thence East 31.60 feet to the Quarter Section line; thence South 0 degrees 38'07" West 131.00 feet along said line to the point of beginning

and from the foregoing, the Court now makes its:

CONCLUSIONS OF LAW

Defendant is entitled to Order, Judgment and Decree that:

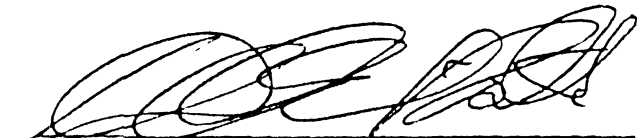
As between Plaintiff and Defendant, Plaintiff has no right, title or interest in and to the following described piece of property situate in Weber County, State of Utah, to-wit:

A part of the Northwest Quarter of Section 16, Township 6 North, Range 1 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at a point 1276.21 feet South 0 degrees 38'07" West along the Quarter Section line from the Northeast Corner of said Quarter Section; running thence West 31.60 feet to an existing fence as located by survey in 1978; thence North 0 degrees 38'07" East 131.00 feet along said fence; thence East 31.60 feet to the Quarter Section line;

thence South 0 degrees 38'07" West 131.00  
feet along said line to the point of  
beginning.

DATED this 7 day of March, 1988.

BY THE COURT:

  
\_\_\_\_\_  
DAVID E. ROTH, JUDGE

2070

Indexed ..... 11

(-1)

LaVar E. Stark #A3080  
Attorney for Defendant  
2485 Grant Avenue  
Suite 200  
Ogden, Utah 84401  
Telephone: (801) 621-3646

MAR 8 9 56 AM '88  
FILE

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

-----oOo-----

FAYE HANCOCK,	:	
Plaintiff,	:	ORDER, JUDGMENT AND DECREE
vs.	:	
PLANNED HOME DEVELOPMENT,	:	
Defendant.	:	Civil No. 88795

*Handwritten signature*

This matter came on regularly for trial on Wednesday, the 9th day of December, 1987 before the Honorable David E. Roth, Judge, presiding without a jury at the Municipal Building, Ogden, Weber County, State of Utah, and Plaintiff was represented by her counsel of record, J. Paul Stockdale and Defendant was represented by its counsel of record, LaVar E. Stark and the Court, having reviewed the file, received the stipulation of the parties, heard the witnesses, examined the documentary evidence and having heard the arguments of counsel and having taken the matter under advisement and reviewed the memoranda of authority submitted

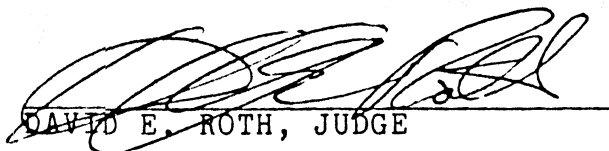
by the parties and being fully advised in the premises, and the Court having made Findings of Fact and Conclusions of Law separately stated and based thereon, now makes the following ORDER, JUDGMENT AND DECREE:

As between Plaintiff and Defendant, Plaintiff has no right, title or interest in and to the following described piece of property situate in Weber County, State of Utah, to-wit:

A part of the Northwest Quarter of Section 16, Township 6 North, Range 1 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at a point 1276.21 feet South 0 degrees 38'07" West along the Quarter Section line from the Northeast Corner of said Quarter Section; running thence West 31.60 feet to an existing fence as located by survey in 1978; thence North 0 degrees 38'07" East 131.00 feet along said fence; thence East 31.60 feet to the Quarter Section line; thence South 0 degrees 38'07" West 131.00 feet along said line to the point of beginning.

DATED this 7 day of March, 1988.

BY THE COURT:

  
DAVID E. ROTH, JUDGE



## Warranty Deed

J. WILLIAM ESTATE, Incorporated, a  
Utah Corporation,

Grantor,

to

STATE INDUSTRIAL SCHOOL OF THE STATE  
OF UTAH,

Grantee.

Volume 132 of Deeds, Page 3

Dated August 6th, 1937.

Recorded Nov. 9th, 1938, 2:12 p.m.

Consideration: \$5,595.00

Signature: J. William Estate Incorporated By Albert L. Williams, President.  
Joseph Williams, Jr., Secretary. (CORPORATE SEAL).

Witness: Stella Richards.

Acknowledged August 6th, 1937, personally appeared Joseph William Jr., and  
Albert L. Williams, who duly sworn say that they are the president and secre-  
tary respectively of J. William Estate, Incorporated, and that said instru-  
ment was signed in behalf of said corporation by resolution of its board of  
directors, and said Joseph Williams Jr. and Albert L. Williams, acknowledged  
that said corporation executed the same, before A. C. Welch, Notary Public,  
Residing at Morgan, Utah. Commission expires March 12th, 1941. (NOTARIAL  
SEAL).

Recital: . . . hereby conveys and warrants . . . the following described  
tract of real estate located in Weber County, Utah, to-wit:

Description: A part of the Northeast quarter of Section 16, in Township 6  
North, Range 1 West, Salt Lake Meridian, United States Survey: Beginning at  
a point on the West line of said quarter section 697 feet South 0°22' West of  
the Northwest corner of said quarter section; running thence South 88°59' East  
592.5 feet; thence South 6°25' East 715.2 feet, to the North side of Second  
Street; thence North 89°10' West 676.9 feet, along North side of Second Street,  
of the West line of said quarter section; thence North 0°22' East 711.3 feet,  
along West line of said quarter section to the place of beginning.

Also a part of the Northeast quarter of said Section 16. Beginning at a  
point 267.5 feet North 87°06' West of a point on the East line of said quarter  
section, said point on East line of said quarter section being 327.4 feet South  
0°22' West of the Northeast corner of said quarter section; running thence  
South 3°24' East 624.8 feet; thence North 89°18' West 1806 feet; thence North  
6°25' West 652.2 feet; thence South 89°06' East 1840.5 feet, to place of be-  
ginning. Together with all water rights.

The State of Utah  
Department of Finance  
Room 137, State Capitol Bldg.  
Salt Lake City, Utah 84114

BOOK 1336 PAGE 196

11/79

QUIT CLAIM DEED

(6)

Utah State Division of Family Services,  
The Department of Social Services, GRANTOR,  
and in accordance with the rules and regulations prescribed by the State of Utah, hereby quit claim to  
Ogden Door Company, 120 Monroe Avenue, GRANTEE,  
of Ogden, Utah 84404 for the sum of  
Forty Thousand (\$40,000.00) DOLLARS, the following tract of land in  
Weber County, State of Utah, to wit:

Two (2) contiguous parcels, identified by legal descriptions  
as Parcel A and Parcel B, on Exhibit A attached hereto and made  
a part hereof.

12-002-0003

12-029-0029

2-29-000,000 000 000

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FILED AND RECORDED  
State of Utah  
Deputy Clerk  
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Such Deed when executed as required by law shall have the effect of a conveyance of all right, title, interest  
and estate of the GRANTOR in and to the premises herein described and all rights, privileges, and appurtenances  
thereunto belonging, at the date of such conveyance.

Utah State Division of Family Services,  
The Department of Social Services, in accordance with law,  
does hereby approve the above and foregoing Quit Claim Deed and the transfer represented thereby and does by  
these presents certify the same to be in accordance with the rules and regulations prescribed by the State of Utah  
and subject to the approval of the Board of Examiners of the State of Utah.

Dated this 21st day of November, 1979

John Bellamy  
Division of Family Services  
Executive Director, Department  
of Social Services

State of Utah }  
County of Salt Lake } ss.

On the 21st day of November, 1979, personally appeared before me,  
Gerri Gelino, the signed of the above instrument, who duly acknowledged  
to me that he had executed the same.

My Commission Expires:

Gerri Gelino  
NOTARY PUBLIC

PARCEL ADESCRIPTION

A part of the Northeast quarter of Section 16, T6N, R1W, SLB & M, U. S. Survey: Beginning at a point which is 694.37 ft. South 0° 38' 07" West of the Northwest corner of the Northeast quarter of Section 16, said point is also 746.30 ft. North 0° 38' 07" East and 20.03 ft. North 89° 09' 45" West, from an Ogden City Monument at the intersection of 2nd St., and Gramercy Ave., Ogden City Survey; running thence South 89° 09' 45" East 1.15 ft. to a fence line on the West side of Monroe Blvd., thence South 17° 59' 41" East 753.64 ft. along said line to the North line of 2nd St., thence North 89° 09' 45" West 241.91 ft. along said line; thence North 0° 38' 07" East 713.30 ft. to the point of beginning, containing 1.99 acres.

PARCEL BDESCRIPTION

A part of the Northeast quarter of Section 16, T6N, R1W, SLB & M, U. S. Survey: Beginning at a point which is 694.37 ft. South 0° 38' 07" West of the Northwest corner of the Northeast quarter of Section 16, said point is also 746.30 ft. North 0° 38' 07" East and 20.03 ft. North 89° 09' 45" West from an Ogden City Monument at the intersection of 2nd St. and Gramercy Ave., Ogden City Survey; running thence South 0° 38' 07" West 713.30 ft. to the North line of 2nd St.; thence North 89° 09' 45" West 31.60 ft. along said line to a fence line; thence North 0° 38' 07" East 713.30 ft. along said line and extension thereof to a fence line; thence South 89° 09' 45" East 31.60 ft. along said line to the point of beginning, containing 0.52 acre.

Mall Tax Notice  
Address

Ogden, Utah

BOOK 1001 PAGE 595

Mall Deed to  
Address

10000000  
422 Taylor  
Ogden, Utah

## WARRANTY DEED

(7)

BETH CARR PETERSON formerly BETH <sup>F.</sup>CARR GRANTOR  
of Ogden County of Weber State of Utah hereby CONVEY and  
WARRANT TO FAYE A. HANCOCK AND DANIEL G. HANCOCK, Mother and Son, as Joint  
Tenants with full right of survivorship and not as tenants in common.

GRANTEE  
of Ogden County of Weber State of Utah, for the sum of  
TEN DOLLARS AND OTHER VALUABLE CONSIDERATIONS ~~DOLLARS~~  
the following described tract of land in WEBER County, State of Utah.

A part of the Northwest Quarter of Section 16, Township 6 North, Range 1 West,  
Salt Lake Base and Meridian, U. S. Survey: Beginning at a point 1276.21 feet South  
from the Northeast corner thereof, and running thence West 200.55 feet, thence  
North 131 feet; thence East 200.55 feet; thence South 0°38'07" West 131 feet to  
beginning.

Subject to fence line encroachment along East line.

WITNESS the hand of said Grantor, this 11th day of June A.D. 1973

Signed in the presence of

STATE OF UTAH } ss. On the 18<sup>th</sup> day of June A.D. 1973  
County of Weber

Personally appeared before me Beth Carr Peterson

the signer of the within instrument, who duly acknowledged to me that he executed the same.

*[Signature]*  
(NOTARY PUBLIC)  
Residing at Ogden, Utah

My Commission Expires:

(NOTARY SEAL)



Use black typewriter ribbon only  
Adopted by Ogden Board of Realtors

Recording Data  
Fees \$ 2.00 Serial No. 12-029-00  
Entry No.

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Compared ☐ Page ☐

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FILED AND RECORDED FOR

*Home Abstract*  
1973 JUN 13 PM 12 09

RUTH LAMPS OLSEN

12-027-0050

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 Photocopied ☐ Card File ☐  
 Microfilmed ☐ Abstracted ☐

BOOK 1181 PAGE 638

Faye A. Hancock  
JUL 7 1977

701004

NORTH WEST CORNER

WESFR

Margaret R. Little

Platted ☐ Indexed ☐  
 Recorded ☐ Abstracted ☐  
 Compared ☐ Paged ☐  
 Microfilmed ☐

(DO NOT WRITE ABOVE THIS LINE)

## QUIT CLAIM DEED

(8)

Daniel G. Hancock and Sherrie A. Hancock, husband and wife

of Ogden County of Weber  
 hereby QUIT CLAIMS to  
 Faye A. Hancock

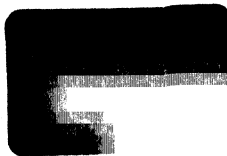
GRANTOR(S)  
State of Utah

of Ogden County of Weber  
 for the sum of Ten Dollars and other valuable consideration,  
 the following described tract(s) of land in

GRANTEE(S)  
 State of Utah,  
 Dollars (\$ 10.00 )  
 Weber County, State of Utah:

A part of the Northwest Quarter of Section 16, Township 6 North, Range 1 West,  
 Salt Lake Base and Meridian, U.S. Survey: Beginning at a point 1276.21 feet  
 South from the Northeast corner thereof, and running thence West 200.65 feet,  
 thence North 131 feet; thence East 200.55 feet; thence South 0° 38' 07" West  
 131 feet to beginning.

Subject to fence line encroachment along East line.

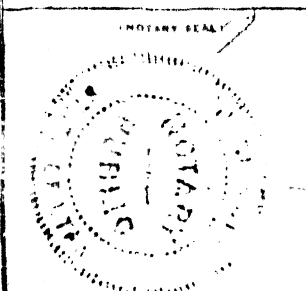


WITNESS the hands of said Grantors this

31st day of May

A.D. 1977

*[Signature]*  
*[Signature]*

State of Utah  
County of Weber

ss. On the 31st day of May A.D. 1977

personally appeared before me Daniel G. Hancock and Sherrie A.  
 Hancock, husband and wife,

the signer(s) of the within instrument who duly acknowledged to me that they are  
 the same.

*[Signature]*  
 Notary Public

Residing at Ogden, Weber County, Utah My Commission expires 10-20-80

MAIL DEED TO

MAIL TAX NOTICE TO

Mail and Notice to  
Address

BOOK 1382 PAGE 390

Mail Deed to Plaintiff Home Dev.  
Address 101 N. 15<sup>th</sup>

Ogden, Utah

Ogden, Utah 84402

# WARRANTY DEED

(Name of corporation)

OGDEN DOOR COMPANY

Grantor

of Ogden

County of Weber

, State of Utah, hereby CONVEY and

WARRANT to PLANNED HOME DEVELOPMENT

GRANTEE

of Ogden County of Weber  
Ten DOLLARS and Other Valuable Considerations

, State of Utah, for the sum of  
DOLLARS

the following described tract of land in Weber

County, State of Utah:

A part of the North half of Section 16, Township 6 North, Range 1 West, Salt Lake Base & Meridian, U.S. Survey: Beginning at a point which is 694.37 feet South 0°38'07" West, 31.60 feet North 89°09'45" West, 355.00 feet South 0°38'07" West and 35.88 feet North 72°00'19" East from the Northwest corner of the Northeast quarter of said Section 16; running thence North 72°00'19" East 103.53 feet to the West line of Monroe Boulevard; thence South 17°59'41" East 427.61 feet along said West line to the North line of 2nd Street; thence North 89°09'45" West 273.51 feet along said North line; thence North 0°38'07" East 358.70 feet; thence South 89°09'45" East 34.00 feet; thence North 0°38'07" East 111.18 feet to the point of beginning.

WITNESS whereof OGDEN DOOR COMPANY has caused

(Corporation name)

the foregoing instrument to be executed in its corporate name and by its President, Attested by its Secretary under its corporate Seal, pursuant to resolution

by its duly authorized officers this 13th

day of November A. D. 19 80

Attest:

OGDEN DOOR COMPANY

(Corporation name)

(Secretary)

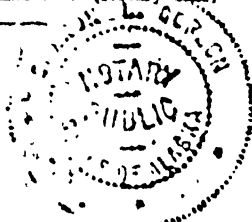
(President)

State of Utah } as. On the 26th day of NOVEMBER 1980 A. D. personally  
County of Weber } appeared before me NORMAN THOMPSON and who  
being by me duly sworn, did say that they are the President and the Secretary  
respectively of the PRESIDENT a corporation and  
that said instrument was signed in behalf of said corporation by authority of a resolution of its  
board of Directors and the said  
acknowledged to me that said corporation executed the same.

*Shawn L. Gordon*  
(Notary Public)

Residing at ANCHORAGE, ALASKA

My Commission Expires 5/2/33  
(Notary Seal)



Recording Data  
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Entry No.

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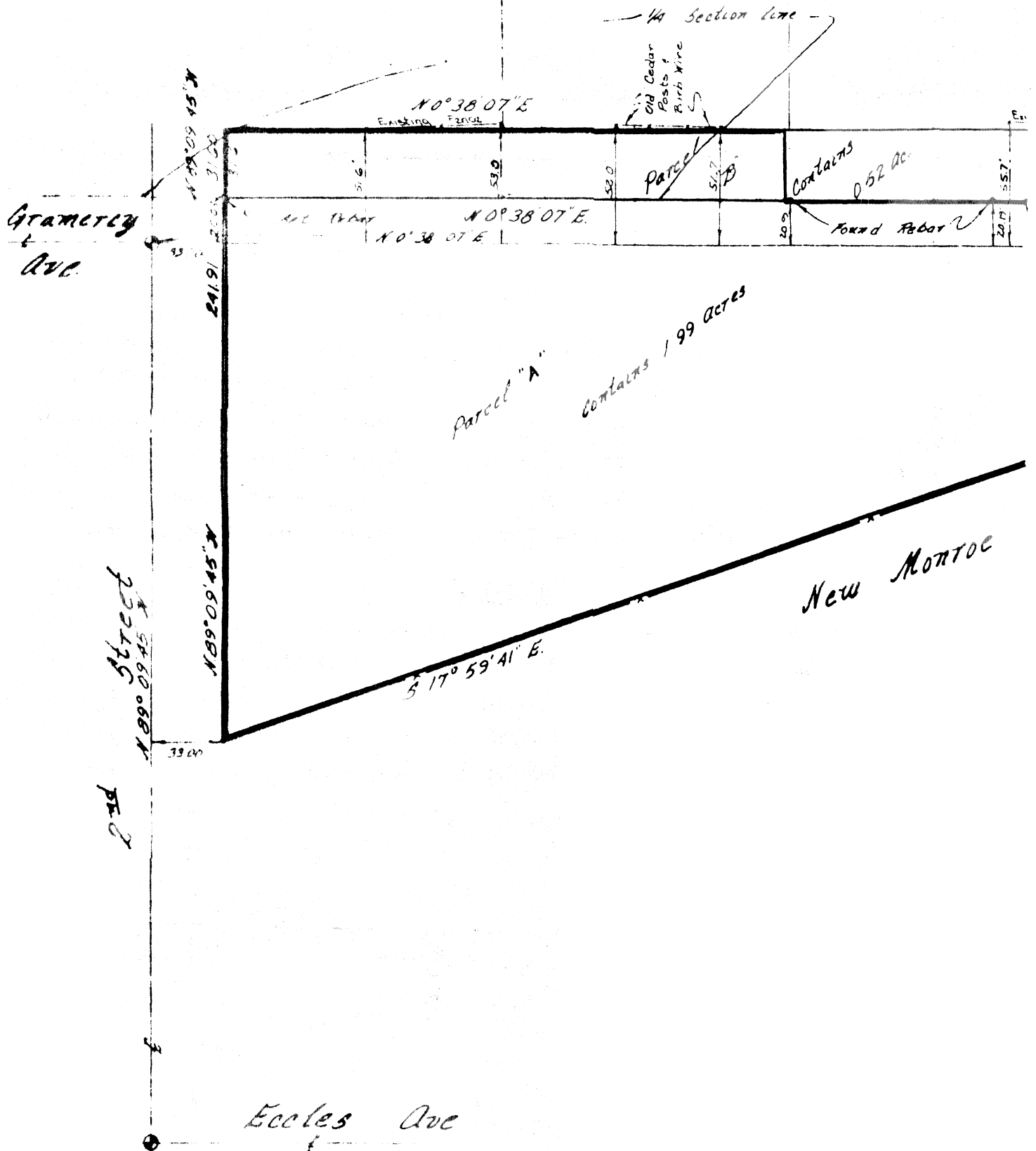
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17 NOVEMBER 1980

MAY 26 PM '81

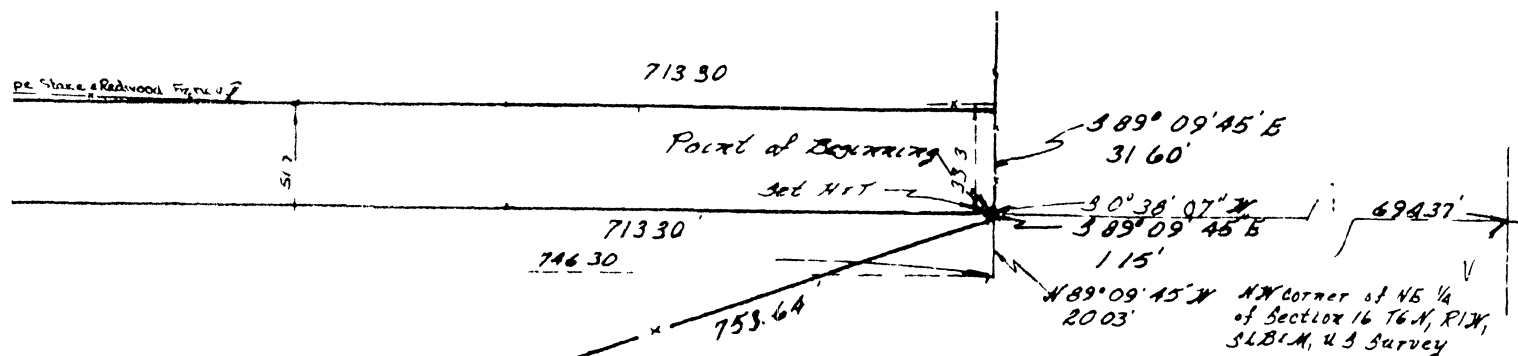
(10)

HANCOCK  
PROPERTY





Scale - 1" = 50'



PARCEL A

DESCRIPTION

A part of the Northeast quarter of Section 16, T6N, R1W, SLB & M, U.S. Survey: Beginning at a point which is 694.37 ft. South 0°38'07" West of the Northwest corner of the Northeast quarter of Section 16, said point is also 746.30 ft. North 0°38'07" East and 20.03 ft. North 89°09'45" West, From an Ogden City Monument at the intersection of 2nd St., and Gramercy Ave., Ogden City Survey; running thence South 89°09'45" East 1.15 ft. to a fence line on the West side of Monroe Blvd., thence South 17°59'40" East 753.64 ft. along said line to the North line of 2nd St., thence North 9°45" West 241.71 ft. along said line, thence North 0°38'07" East 713.30 ft. to the point of beginning.

EL B

DESCRIPTION

Contains 1.99 acres


A part of the Northwest quarter of Section 16, T6N, R1W, SLB & M, U.S. Survey: Beginning at a point which is 694.37 ft. South 0°38'07" West of the Northwest corner of the Northeast quarter of Section 16, said point is also 746.30 ft. North 0°38'07" East and 20.03 ft. North 89°09'45" West from an Ogden City Monument at the intersection of 2nd St. and Gramercy Ave., Ogden City Survey; running thence South 0°38'07" West 713.30 ft. to the North line of 2nd St.; thence North 89°09'45" West 31.60 ft. along said line to a fence line; thence North 0°38'07" East 713.30 ft. along said line extension thereof to a fence line; thence South 89°09'45" East 31.60 ft. along said line to the point of beginning.

Contains 0.52 acre

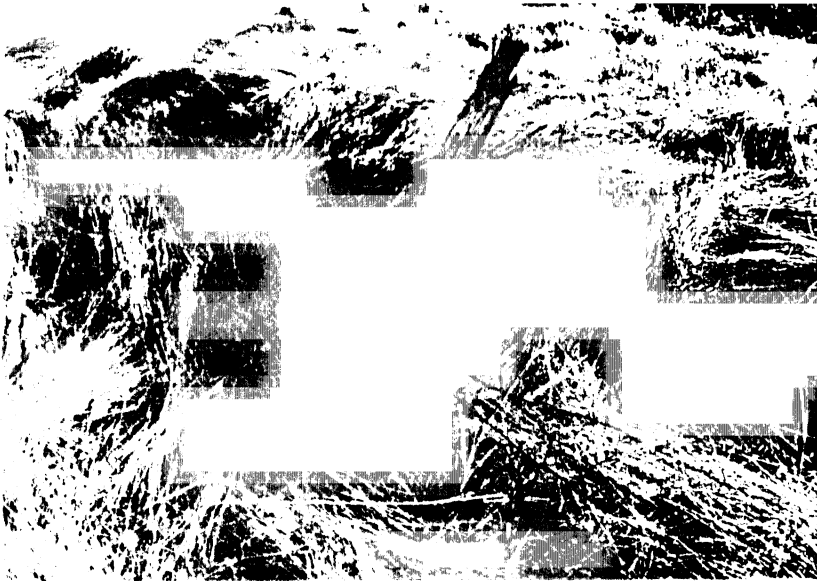
John A. Bradshaw, do hereby certify that I am a Registered Land Surveyor, and that I hold Certificate No. 2680, as prescribed by the Laws of the State of Utah, and I have made a survey of the above described property. I further certify that the above plat correctly shows the true dimensions of the property surveyed.

June 27, 1978



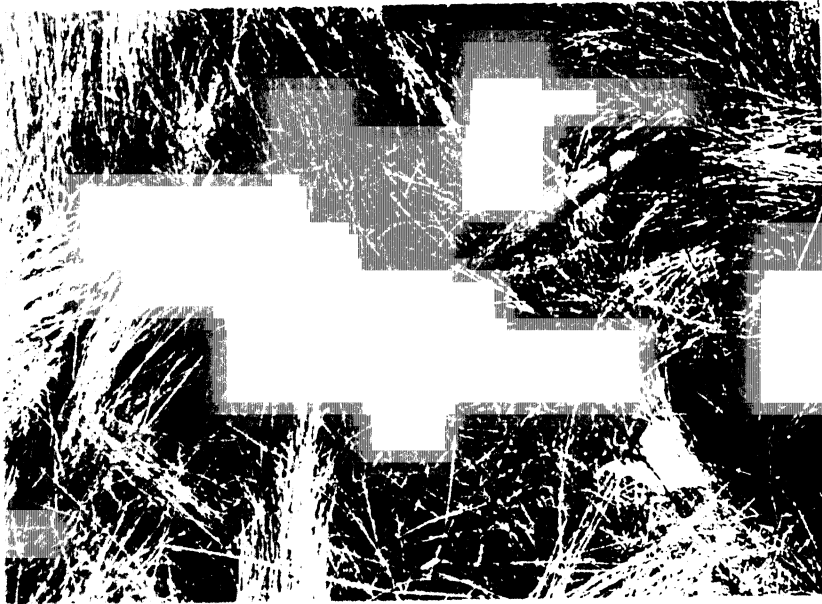
 <b>GREAT BASIN ENGINEERING &amp; SURVEYING, II</b> CONSULTING ENGINEERS & SURVEYORS OGDEN, UTAH 84401		
<b>Property Survey</b> for <b>Utah State Industrial School</b> A part of the NE 1/4 of Sec 16, T6N, R1W, SLB & M		
DRAWN: <i>JTB</i>	CHECKED: _____	
DATE June-1978	SCALE 1" = 50'	DRWG NO. PS-78-194





(11)

Fence post on line  
as indicated by 1978  
Survey



Bottom of post still  
firmly planted in the  
ground



Additional post in line  
with old fence

FENGUO-Bygone, N.J.	Defendant's Exhibit
	Exhibit No. <u>16</u>
	Case No. <u>85-720</u>
	Date. _____